No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,
Plaintiff,
and
STATE OF TEXAS, *et al.*,
Intervening Plaintiffs,

v.

STATE OF NEW YORK,
Defendant.

On Exceptions to the Special Master's Report

RESPONSE OF PLAINTIFF, STATE OF DELAWARE, TO MOTION OF DEFENDANT, STATE OF NEW YORK, FOR LEAVE TO FILE AMENDED ANSWERS AND LEAVE TO FILE COUNTERCLAIMS

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Plaintiff, State of Delaware, by its undersigned counsel, hereby respectfully submits its response to the motion of Defendant, State of New York, for leave to file first amended answers and leave to file counterclaims.

New York has asked the Court for leave to file what it calls "minor technical amendments in order to plead compulsory counterclaims," supposedly "under Rule 13(f) of the Federal Rules of Civil Procedure." New York's Motion for Leave to File First Amended

Answers and Leave to File Counterclaims (Dec. 22, 1992) at 1. The motion thus seeks leave to plead various "counterclaims," which New York hopes might provide it with setoffs or other means of reducing its net liability in this case if the Master's rule changes are applied to it on a retrospective basis.[1] Both the timing and in considerable part the substance of New York's motion are ill-conceived.

New York's motion is premature and should not be entertained until after the Court renders its decision; in addition, the motion raises troubling issues about the scope and application of the rule changes that the Master has recommended. Most fundamentally, New York's motion demonstrates that—notwithstanding the Intervenors' protestations to the contrary—if the Court adopts the Master's rule changes, it will have started down the path of case-by-case adjudication

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[1] It should be noted that the requested relief will have no pertinence if the Court adopts Delaware's position that the state-law debtors—the brokers, the DTC and the custodian banks—should continue to be viewed as the "debtors" for the purpose of applying the system of escheat priority established in the *Texas* and *Pennsylvania* cases, and if the Court declines the Master's invitation to change the "backup" rule to make it refer to the "State of principal executive offices" rather than the "State of incorporation." This will be so even if the Court further agrees with us (and with the Master) that the money owed to unknowns in the hands of the Delaware brokers should escheat under the "backup" rule, not under the "primary" rule, as New York asserts. This result would not involve a change in the law, and, accordingly, it would not provide an occasion for the granting of the motion for leave to file counterclaims by New York, although it would result in a recovery by Delaware of the monies taken from the Delaware-incorporated brokers by New York—the "collection case" referred to in oral argument. We do not understand New York to contend otherwise.

and "interpretation" in an area where the law should be settled. If the Master's changes are adopted in this case, further efforts to modify the rules cannot be far behind, as New York's motion indicates.

1. *The Motion Is Premature.*—Consideration of whether to grant the relief sought in New York's motion would best be deferred until after the Court rules on the Exceptions argued before it on December 9, 1992; at that point, New York could, if the Master's rule changes are adopted, make its arguments for setoff based on an actual holding, rather than on its current speculation that the Court might adopt some or another part of the Master's recommendations or do something else that might occasion the assertion of a setoff in favor of New York.

Delaware has no quarrel with the notion that if the Master's changes are adopted (which they should not be), they should be applied to all States—to the extent that doing so would be consistent with the principles of law that govern actions between States in this Court. However, the extent to which New York should be permitted to set off its liabilities as against the other States (or otherwise to recover amounts from the other States that would reduce its net out-of-pocket loss) in the event that the Master's proposed changes are adopted can best be evaluated, we submit, in the light of the Court's actual ruling. Surely there will be room and time for New York to seek appropriate setoff or other relief at the foot of the Court's decree if the rules are changed.

2. *New York's Requests To Expand the Scope of the Case Should Be Denied.*—Buried in New York's proposed counterclaim is a request that would substantially alter the nature of the present action: New

York has, *sub silentio*, asked the Court to expand the scope of the case beyond unclaimed securities distributions to cover, in addition, *all* "abandoned intangible property *other than* unclaimed securities distributions." New York's Proposed First Amended Answer, Counterclaim 1(c), with respect to Delaware at A-7 of New York's Motion (emphasis supplied); *see also id.* at A-26, A-32, A-39 (similar counterclaims as to other States). New York does not actually acknowledge that it is attempting a substantial expansion of the scope of the case, but the fact remains that, to date, no one else has attempted to put property other than unclaimed securities distributions at issue in this case. A *desire* to expand the universe of the Master's proposed rule changes may have always run just beneath the surface of the Intervenors' arguments, but most of the Intervenors have denied the precedential effect that adopting the Master's proposals might have in areas other than unclaimed securities distributions. *See* Ala. Surreply in Response to Delaware's Reply Brief at 7 (Aug. 31, 1992) ("the specter of future case-by-case litigation is unwarranted"); *cf.* Tx. Reply Brief at 51 (July 27, 1992) (asserting that the "principal executive offices" rule should be viewed as a change "of general applicability"). New York's request that the Court expand the scope of this case is, of course, a harbinger of future efforts of other States to seek expansion of the Master's rule changes and to seek other case-by-case "interpretations," freed of the moorings provided by *stare decisis*.[2]

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[2] A less egregious but still objectionable assertion is contained in counterclaim 1(b) tendered by New York. (Against Delaware, appearing at page A-7; against other States at A-26, A-32, A-38.) Unlike counterclaim 1(c), this counterclaim is restricted to securities distributions; but unlike the ex-

New York mistakenly offers, as a rationale for its effort to expand the scope of the case, a quite casual discussion of Rule 13(f) of the Federal Rules of Civil Procedure, which allows district courts discretion to permit litigants to pursue "omitted" counterclaims. But since New York never draws attention in its motion to the fact that its counterclaims go beyond securities distributions, the discussion of Rule 13(f) never focuses on the issue raised by the dramatic expansion of the counterclaim beyond the issues in the case, which have already been joined, briefed and argued.

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isting subject matter of the case—which solely concerns such distributions in the hands of brokers, depositories and other intermediaries—counterclaim 1(b) addresses such unclaimed distributions in the hands of issuers and their agents, such as transfer agents and paying agents. There is apparently a large universe of this property (*see* Delaware's Brief in Support of Exceptions, pp. 12-14 n.17), but this sort of property has never been at issue in this case.

Besides expanding the scope of the case to this extent, the practical purpose of counterclaim 1(b) is unclear; because issuers and their agents do not receive incoming distributions from anyone else (unlike brokers, depositories and other nominees), and because they maintain a list of holders of record to which they send their outgoing distributions, they generally have a name and address for everyone to whom they make a distribution. Thus, all the items in this category, returned or unnegotiated checks, presumably escheat under the "primary" rule—the claimants' names and last-known addresses are available. Unless New York is suggesting that some change be made in the "primary" rule to match the Master's changes in the "backup" rule, the purpose of pleading this counterclaim remains obscure, and, given this Court's strictures on the invocation of its original jurisdiction (see p. 6, *infra*), it should not be permitted without further explanation.

In any event, Rule 13 does not govern the outcome of New York's motion. It is true that, "when their application is appropriate," the rules of civil procedure "may be taken as a guide to procedure in an original action in this Court." S. Ct. R. 17.2. But their application is not always appropriate. *See Utah* v. *United States*, 394 U.S. 89, 95 (1969) (rejecting application of Fed. R. Civ. P. 19 to a necessary party in an original action because "our original jurisdiction should be invoked sparingly"). The lower courts' experience with Rule 13, which is designed to promote judicial efficiency by eliminating multiple trials where possible (*see Southern Constr. Co.* v. *Pickard*, 371 U.S. 57, 60-61 (1962); 6 Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 1430 at 223 (2d ed. 1990)), is unhelpful in illuminating the factors that govern whether leave to file counterclaims should be granted in this Court. In contrast to the liberal interpretation of Rule 13 promoted for use in the trial courts, this Court will exercise its original jurisdiction only "sparingly," so that its "increasing duties with the appellate docket will not suffer." *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93-94 (1972). Expanding the present case to the extent sought by New York is tantamount to permitting the fresh exercise of the Court's original jurisdiction. Moreover, the Rule 13 equivalent to New York's motion would be a request to assert counterclaims going far beyond the subject matter of the litigation after a dispositive summary judgment motion is *sub judice*. Even in the district courts, this would hardly be viewed as a compelling case for the exercise of a discretion vested for the purpose of promoting judicial economy, *cf. Mc-*

Lemore v. *Landry*, 898 F.2d 996, 1003 (5th Cir.), *cert. denied*, 111 S. Ct. 428 (1990).[3]

New York seeks to graft a large branch onto a small tree. (Recall that approximately $1 billion worth of all kinds of intangible property is escheated by the fifty States annually, *see* Delaware's Brief in Support of Exceptions at 60.) In doing so, it simply does not address the factors governing the exercise of this Court's original jurisdiction. (For a recent discussion of these factors, see *Mississippi* v. *Louisiana*, 113 S. Ct. 549, 552 (1992).) In short, through counterclaim 1(c), New York seeks relief that properly should be the subject of a separate action in which the Court could evaluate whether to grant New York leave to file a complaint in the light of the actual property put at issue in an actual case. Even under the more liberal standards of Rule 13(f), New York's request that the action be broadened to embrace all kinds of unclaimed intangible property would be rejected as inconsistent with the smooth operation of the litigation.

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[3] The status of a claim like counterclaim 1(c) as a *compulsory* counterclaim—as New York asserts—is far from clear: it is difficult to perceive a logical relationship between "abandoned unclaimed securities distributions" and "abandoned intangible property *other than* unclaimed securities distributions," except that both involve the law of escheat. *Cf. United States* v. *Aronson*, 617 F.2d 119, 121-22 (5th Cir. 1980) (tax refund suit involving one year does not give rise to compulsory counterclaims for taxes arising out of other years); *see generally* 6 Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 1410 (2d ed. 1990) (discussing the application of various interpretations of the "transaction or occurrence" test of Rule 13(a)).

3. *New York Is Not Entitled to "Retroactive" Relief From Delaware.*—As an attempt to mitigate its losses, New York seeks "retroactive" application of the rule changes as against all States including Delaware. In our Brief in Support of Exceptions (at pages 76-83), we demonstrated why such relief against Delaware would be unjust. No one—especially not New York—disputed that demonstration. (The Intervenors expressly declined to address it on the ground that no claims against Delaware were being made in this case.) Even if the Court were to adopt the Master's rule changes, they should not be applied to Delaware in favor of anyone—not the Intervenors and not New York. Our demonstration to that effect remains undisputed.

CONCLUSION

New York's motion should be denied, or, if the Court is so advised, denied without prejudice to renewal after the Court announces its decision on the Exceptions argued before it on December 9, 1992. Alternatively, the motion might be held by the Court pending that decision. If the Court rejects the Master's redefinition of the "issuer as debtor" and his proposed change of the backup rule from the "State of incorporation" to the "State of principal executive offices," there will be no basis, even under New York's theory, to grant the motion, and it should in that case be denied.

If one or both of the Master's rule changes are accepted by the Court, the motion should not be permitted to be used as a vehicle to expand the scope of the litigation beyond what the parties, the Master and the Court have already addressed, and any grant

of New York's motion at that time should be on condition that paragraphs 1(b) and 1(c) of the counterclaims be stricken.[4]

Respectfully submitted,

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[4] Delaware, of course, reserves all of its defenses, including the defense that retroactivity would be inappropriate, touched on above, to the counterclaim against it, should the Court grant New York leave to file the counterclaims.